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CURRENT TOPICS.

The attempt which was made upon last Saturday morning upon the life of the President, suggests a defect in the criminal law of this country. Although the life of an officer in the exalted position of the chief magistrate, is of inestimable value to the public, irrespective of his worth as a man, still there is no specific provision of law looking to the protection of such a life.

The crime committed by Guitteau in the Baltimore & Potomac Depot, on the 2d of July, is not a crime against the laws of the United States other than as being a crime against the peace and dignity of the District of Columbia, and is of no graver character in the eye of the law than if it had been committed upon the person of the seediest tramp that walks Pennsylvania Avenue. We are not in any sense monarchical in our tendencies, and we think the plain simplicity which has characterized the surroundings of our presidents is a wholesome thing, but unquestionably, the protection of extraordinary interests demands extraordinary safeguards, and we can see no impropriety in making an attempt upon the life of the chief executive of a great people an offense punishable with death.

In a recent issue of the *Law Times* it is said: "An appeal from the decisions of the deputy-judge of the Skipton county court, which was determined a few days ago by Baron Huddleston and Mr. Justice Hawkins, raised a point of some importance with reference to the liability of a master for an accident resulting from the negligence of his servant. Watkinson v. Slingsby. The action was brought to recover damages for the negligence of Robinson in the use of a gun, which went off and shot the plaintiff through the foot. Robinson, who was the game-watcher of the other defendant, was entrusted with a gun by him for the purpose of destroying magpies and other vermin on his master's land. The accident happened whilst the game-watcher was teasing a ferret on the high road, the loaded gun being under his arm. It was argued that, as the master placed the weapon in the hands of his servant, he was liable for the negligent use of it. The deputy-judge, however, took a different view, and entered judgment for the master. This course, it need scarcely be remarked, received the approval of the divisional court. The point which was attempted to be made in favor of the plaintiff is, as we have already said, of some importance; but it is free from any reasonable doubt. There is a well-established principle, that where the authority of an agent or servant, as the case may be, is confined to a particular place, an act done in another place will not be within the scope of his authority. For instance, where a servant, employed to impound sheep found upon his master's land, improperly impounded sheep found upon a highway out of his land, the court held that the master was not liable for the servant's act. Lyons v. Martin, 8 Ad. & E. 512. So again in Lord Bolingbroke v. Swindon Local Board (30 L. T. R. N. S. 723), the court held that an agent intrusted with authority to be exercised over a particular piece of land, has no authority to commit a trespass on other land."

TITLE TO LANDS UNDER FRESH WATER LAKES AND PONDS.

In the Northwestern States there are innumerable lakes and ponds, which are largely resorted to for pleasure, and for the opportunities they furnish for the taking of game and fish. The scenery about them is, in most cases, picturesque and inviting, and they become, favorite locations for residence. On some the navigation is valuable for business purposes; others are navigated for pleasure only. In surveying the public domain for the purposes of sale, the Government caused all that were too large to be embraced within a single subdivision of a section, to be meandered at the water line, and the dry land only was measured for sale. The waters of many of these lakes and ponds are receding gradually, and some, after a time, disappear. Under these circumstances, the question who

owns the bed is one of considerable importance in the northwest, and is of interest in other parts of the country, though not so likely elsewhere to become the subject of litigation.

So far as concerns fresh water streams, the rule of the common law is clear and unquestionable. The owner of the bank owns to the thread of the stream, subject to the public rights of navigation, and perhaps of fishery; and he may make of it any use not inconsistent with the public easement.[1]

If there are islands in the river, they belong to the owner of the bank on whose side of the center they lie; or, if they divide the main channel, they will themselves be divided in ownership between the bank proprietors.[2] And the above rules apply without regard to the magnitude or importance of the river whose bed or islands are in question.[3] In North Carolina and Iowa, however, a different rule is applied; and it is held that, in the case of large rivers whose chief characteristic is their navigability, the line of private ownership is the bank, and not the thread of the stream;[4] and such seems to be the rule in Indiana and Pennsylvania also.[5] The judiciary of the State of New York also, after considerable vacillation, is, at last, unmistakably arrayed on the same side of this important question.[6] Whether the line of low water mark, or that of high water mark, is to be considered the boundary when the thread of the stream is not, is a question on which there are differences of opinion, and we shall not enter upon it here.

If the bank owners do not own the bed of the stream, it will be conceded that it is owned by the State. Whenever the United States was original owner, the right passed to the State on its admission to the Union, with all other rights pertaining to the eminent domain.[7]

But whether the State owns it as proprietary, or only as sovereign, is a point of no little interest. If it owns the soil as proprietary, it may perhaps sell it for private improvement and occupation, and the bank owner may thereby be cut off from any use of the stream in connection with his estate, and be deprived of benefits which he had reason to suppose he had acquired absolutely by his purchase. But if the State owns it as sovereign merely, under the eminent domain, it is to be preserved as the right of navigation is, for the common benefit and enjoyment of all the people. In New York it has been held that, on tide waters, the State may sell the bank between high and low water mark, and that the riparian owner has no remedy.[8] Also, that the State may grant the bed of one of its fresh water navigable rivers, and turn away the river from the land of the bank owner without his being entitled to any redress.[9] But this seems very harsh doctrine; and it is certainly one which has never been much acted upon, and is probably not generally accepted.[10]

It is a little remarkable that in England the question, "whether the soil of lakes, like that of fresh water rivers, *prima facie* belongs to the owners of the land, or of the manors on either side, *ad medium filum aquæ*, or whether it belongs *prima facie* to the king in right of his prerogative," has never been authoritatively determined. It was referred to in a recent decision,[11] but passed by, as

[1] Bichett v. Morris, L. R. 1 H. L. Sc. Ap., 47; Palmer v. Mulligan, 3 Caines, 307; Jackson v. Halstead, 5 Cow. 216; Horne v. Richards, 4 Call. 441; Browne v. Kennedy, 5 H. & J. 195; Arnold v. Mundy, 6 N. J. 1; Gough v. Bell, 21 N. J. 160; Young v. Harrison, 6 Ga. 141; Adams v. Pease, 2 Conn. 281; Chapman v. Kimball, 9 Conn. 38; Rice v. Ruddiman, 10 Mich. 126; Lorman v. Benson, 8 Mich. 18; Hayes v. Bowman, 1 Rand. 417; McCullough v. Wall, 4 Rich. (S. C.) 68; State v. Gilmanton, 9 N. H. 461; Norway Plains Co. v. Bradley, 52 N. H. 85; Boston v. Richardson, 105 Mass. 351; Houck v. Gates, 82 Ill. 179; Delaplaine v. Railroad Co., 42 Wis. 214; Morgan v. Redding, 5 Sm. & Mar. 195; Magnolia v. Marshall, 39 Miss. 109; Birney v. Snyder, 3 Bush, 266; Granger v. Avery, 64 Me. 292; O'Fallon v. Daggett, 4 Mo. 343; Ross v. Faust, 54 Ind. 471.

[2] Ingraham v. Wilkinson, 4 Pick. 268; Trustees v. Dickinson, 9 Cush. 548.

[3] Rundle v. Canal Co., 1 Wall. Jr., 275; Adams v. Pease, 2 Conn. 481; Schurmeier v. Railroad Co., 10 Minn. 82; Houck v. Yates, 82 Ill. 179; Arnold v. Elmore, 16 Wis. 509; Gas Light Co. v. Industrial Works, 28 Mich. 182; Stewart v. Clark, 2 Swan, 9.

[4] Wilson v. Forbes, 2 Dev. 30; Collins v. Benbury, 3 Ired. 277; Fagan v. Armistead, 11 Ired. 433; McManus v. Carmichael, 3 Iowa, 57; Fourten v. Railroad Co., 32 Iowa, 106; Houghton v. Railroad Co., 47 Iowa, 376.

[5] Sherloch v. Bainbridge, 41 Ind. 35; Zug v. Commonwealth, 70 Pa. St. 138. And see Bullock v. Wilson, 2 Port. 447; Barney v. Keokuk, 94 U. S. 324, and cases cited; Walker v. Board, 16 Ohio, 540; Elder v. Buerus, 6 Humph. 366.

[6] People v. Canal Appraisers, 33 N. Y. 461.

[7] Pollard v. Hagan, 3 How. 212.

[8] Gould v. Railroad Co., 6 N. Y. 522.

[9] People v. Canal Appraisers, 33 N. Y. 461.

[10] See Bell v. Gough, 23 N. J. 624; Stevens v. Railroad Co., 34 N. J. 532; Walker v. Board, 16 Ohio, 540.

[11] Marshall v. Navigation Co., 3 Best & Smith, 732.

not being necessarily involved in the case at bar. In Massachusetts, by the construction of the colonial laws and ordinances, extending back almost to the first settlement, it is held that great ponds belong to the State, which may grant away either the soil or the water, or both; and that the boundary of the bank proprietor is at low water mark.[12] Under this rule, the State is at liberty to cut off by its grants all water rights in the bank proprietors. The Massachusetts decisions on this subject have little or no bearing on kindred questions arising at the common law, for the reason that private grants in the colony were made subject to the colonial laws which forbade the appropriation of great ponds to individuals.

In New York the rule is established as a common law rule, that the boundary of private ownership on fresh water lakes and ponds, is the low water mark.[13] In Vermont the rule is the same; and it is there held in reliance upon New York precedents, that the bank owner has no appurtenant right in the water which would enable him to maintain ejectment against one who should take possession, fill in and occupy the bed of the pond below the low water line in front of him.[14] In Illinois a deed of land, in which one boundary was described as "following the course of" Lake Michigan, was held to bound the land by the line at which the water usually stands when free from disturbing causes. In the decision of this point, Justice Walker says: "The great lakes of the North present questions affecting riparian rights that are different from those arising under boundaries on the sea, upon rivers, or other running streams. They have neither appreciable tides nor currents, nor are they affected, like running streams, by rises and falls produced by a wet or dry season. Yet the rules that govern boundaries on the ocean govern this case. A grant giving the ocean or a bay as the boundary, by the common law carries it down to ordinary high water mark. The doctrine, it is believed, is well settled, that the point at which the tide usually flows is the boundary of a grant to its shore. As the tide ebbs and flows at short and regularly recurring periods to the same points, a portion of the shore is alternately sea and dry land. This, being unfit for cultivation or other private use, is held not to be the subject of private ownership, but belongs to the public. When the adjacent owner's land is bounded by the sea or one of its bays, the line to which the water may be driven by storms, or unusually high tides, is not adopted as the boundary. On the contrary, the ordinary high water mark indicated by the usual rise of the tide is his boundary."

"This principle, however, which requires the usual high water mark as the boundary on the sea, and not the highest or the lowest mark to which it rises or recedes, applies in this case, although this body of water has no appreciable tides. Here as there, the highest point to which storms or other extraordinary disturbing causes may drive the water on the shore, should not be regarded as the point where the owner's rights terminate, nor yet should it be extended to the lowest point to which it may recede from like disturbing causes. But it should be at that line where the water usually stands, when unaffected by any disturbing cause. The portion of the soil which is only seldom covered with water, may be valuable for cultivation or other private purposes. And the line at which it usually stands, unaffected by storms or other disturbing causes, represents the ordinary high water mark on the ocean, and the point between the highest and lowest water marks produced by the tides. Again, where is the lake as called for by the deed? A fair and reasonable construction of the language, running to the lake, and with the lake, would mean to that place where its outer edge is usually found."[15]

This is specific and lucid; but it may be observed of the great lakes, that the outer edge is not usually found at the same line in successive years. These bodies of water have their periodical rise and fall; and though these do not usually flood and uncover any considerable belt of land, they do so in some

[12] Cummings v. Barrett, 10 Cush. 186; Paine v. Woods, 108 Mass. 160; Commonwealth v. Vincent, 108 Mass. 441; Fay v. Aqueduct Co., 111 Mass. 27; Hittinger v. Eames, 121 Mass. 539. A pond of more than ten acres, is considered a "great pond" under the Massachusetts colonial laws. See Body of Liberties, art. 16; Commonwealth v. Vincent, *supra*.

[13] Wheeler v. Spinola, 54 N. Y. 377; Canal Com'rs. v. People, 5 Wend. 423.

[14] Austin v. Railroad Co., 45 Vt. 205. See Fletcher v. Phelps, 28 Vt. 257; Takeway v. Barrett, 46 Vt. 316.

[15] Seaman v. Smith, 24 Ill 521.

localities where the shore is but little elevated above the lake.

The rule, as thus declared in Illinois, is approved in Ohio, with a reservation of any opinion, however, "in regard to the right of a riparian owner to build out beyond his strict boundary line, for the purpose of affording such convenient wharves and landing places in aid of commerce, as do not obstruct navigation."[16] In New Hampshire the like view seems to prevail.[17] In Wisconsin the boundary is held so be the ordinary water line, but with appurtenant water rights. Say the court: "There are *dicta* and decisions which hold, in reference to such bodies of water, the riparian proprietor takes only to the edge of the water in its ordinary condition when unaffected by winds or other disturbing causes; the proprietorship of the bed of the lake being in the State. This view commends itself to our judgment as sound and correct; and we have accordingly decided,[18] that the water's edge is the boundary of the title of the riparian proprietor. But while the riparian proprietor only takes to the water's line, it by no means follows, nor are we willing to admit, that he can be deprived of his riparian rights without compensation. As proprietor of the adjoining land, and as connected with it, he has the right of exclusive access to and from the waters of the lake at that particular place; he has the right to build piers and wharves in front of his land out to navigable waters in aid of navigation, not interfering with the public use. These are private rights incident to the ownership of the shore, which he possesses distinct from the rest of the public. All the facilities which the location of his land with reference to the lake affords, he has the right to enjoy for purposes of gain or pleasure; and they often give property thus situated its chief value. It is evident from the nature of the case, that these rights of user and exclusion are connected with the land itself, grow out of its locatian, and can not be materially abridged or destroyed without inflicting an injury upon the owner which the law should redress. It seems unnecessary to add the remark, that these riparian rights are not common to the citizens at large, but exist as incidents to the right of the soil itself adjacent to the water. In other words, according to the uniform doctrine of the best authorities, the foundation of riparian rights, *ex vi termini*, is the ownership of the bank or shore. In such ownership they have their origin. They may, and do exist, though the fee in the bed of the river or lake be in the State. If the proprietor owns the bed of the stream or lake, this may possibly give him some additional right; but his riparian rights, strictly speaking, do not depend on that fact."[19] The same view of the riparian rights of the bank proprietor is held by the Federal Supreme Court, by which it has been declared that the right of such proprietor to erect piers, wharves, etc., only terminates at the line where the water becomes actually navigable.[20]

In Michigan it has been decided, that the bed of those little lakes through which rivers flow, and which are in the nature of expansions of the rivers themselves, belongs to the bank proprietors, subject to the public rights therein.[21] Judging from *dicta* in the decisions, it seems probable that the same rule would be applied to all other lakes. The practical difference between this ruling and that in Wisconsin and the Federal Supreme Court is not so great as at first blush might seem. If the bank owner is proprietor of the bed also, he is limited in his use of it only by the public rights; if not proprietor of the bed, he may still make use of it, limited only by the public right. The State or proprietor can not, either by regulation or sale, take from him his appurtenant rights in the water or in the navigation.

In Wisconsin it is also held that the rule of bank ownership is the same, whether the water is or is not susceptible of use for navigation.[22] Nevertheless, if accretions are formed on the shore of non-navigable ponds by slow and imperceptible degrees, or if the bed is uncovered by the gradual recession of the waters, the land thus made or recovered belongs to the

[16] Sloan v. Biemiller, 34 Ohio St. 492.

[17] State v. Gilmanton, 9 N. H. 461; State v. Franklin Falls Co., 49 N. H. 240, 250. See also Bradley v. Rice, 13 Me. 198; Wood v. Kelly, 30 Me. 55; Robinson v. White, 42 Me. 209; Murray v. Lermon, 1 Hawks, 56.

[18] Diedrich v. Railway Co., 42 Wis. 248.

[19] Cole, J., in Delaplaine v. Railway Co., 42 Wis. 214, 225, quoting with approval Lyon v. Fishmongers' Co, L. R. 10 Ch. Ap. Cas. 679, S. C. 1 Ap. Cas. 683.

[20] Dutton v. Strong, 1 Black, 23.

[21] Rice v. Ruddiman, 10 Mich. 125. See Lorman v. Benson, 8 Mich. 18.

[22] Boorman v. Sunnucks, 42 Wis. 233.

proprietor of that which adjoins it. Under this ruling, if a lake or pond gradually disappears altogether, the adjoining proprietors would become owners of the whole bed, and might find their possessions increased to several times the original size. A like ruling has been made by the Federal Supreme Court.[23] In Michigan a like rule would probably be applied, whether the lake disappeared slowly or suddenly; and there really seems no reasonable ground for distinguishing the cases, if obedience to precedent did not seem to require it. It was held in North Carolina at an early day, that a grant could not be made in front of the water line, so as to cut off the bank-owner's right to alluvion;[24] and decisions covering the same principle have been made in Louisiana[25] and Arkansas.[26] Except, therefore, as the suddenness of the change might render it difficult to adjust boundaries between adjacent proprietors of the bank, there seems to be no sufficient reason why the State should claim title. But, in truth, the difficulty in extending the lines does not depend on the change being precreptible, or the reverse; it is solved as soon as it is determined by what rule the dividing lines shall be extended from the original shore. If we apply the same rule that is applied to rivers, and extend them into the bed of the lake or pond at right angles to the general course of the shore at the point of intersection, the extension can be made as well, and as readily when the change is sudden, as when it is made by slow degrees and imperceptibly. But this is not a very important matter, as the little lakes and ponds of the Northwest generally recede gradually if at all; and whether under the Wisconsin rule or that of Michigan, if they disappear, their beds come at last to be private property without any grant from the State.

One important right, however, may depend upon the question whether the ownership of the bed of lakes and ponds is in the State or in the bank owners. We refer now to the right of fishing. It is generally held that the right of fishing follows the ownership of the bed; if that is in the State, the fishing is public; if not, it belongs to the bank proprietor.[27] And this rule has been applied to small ponds or lakes owned by individuals, after very full and careful examination of the whole subject.[28] But if the waters are navigable, and the public for that reason have rights therein, the right of fishing may well be held to be public also, irrespective of the ownership of the bed.[29] But of course, the public can not use the shore for the convenience of fishing without consent of the owner, nor so occupy the waters immediately in front as to deprive the owner of any appurtenant rights.

The right to cut and remove ice is perhaps to be held public or individual, according to the same rules which govern the right of fishing.[30]

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[23] Jones v. Johnson, 18 How. 156. See Banks v. Ogden, 2 Wall. 57; St. Clair v. Lovingston, 23 Wall. 46.

[24] Murray v. Lennon, 1 Hawks, 56.

[25] Municipality v. Cotton Press, 18 La. An. 122.

[26] Belding v. State, 25 Ark. 120.

[27] Browne v. Kennedy, 5 H. & J. 195; People v. Platt, 17 Johns. 195; Carson v. Blaze, 2 Binn. 475; Beekman v. Kreamer, 43 Ill. 447.

[28] Cobb v. Davenport, 32 N. J. 369; S. C. 33 N. J. 223.

[29] State v. Franklin Falls Co., 49 N. H. 240; Sloan v. Biemiller, 34 Ohio St. 492; Carson v. Blaze, 2 Binn. 475.

[30] Mill River & Co. v. Smith, 34 Conn. 462; Paine v. Woods, 108 Mass. 160; Lorman v. Benson, 8 Mich. 18.

WORDS OF RELATIONSHIP IN WILLS.

It is said that the librettist of the "Pinafore," consciously or unconsciously, pilfered from Blackstone's chapter on coparcenary [1] the collocation of relationships adopted in the hackneyed line, "And so do his sisters, and his cousins, and his aunts." But, lawyer though he be, we dare to doubt whether Mr. Gilbert himself could render offhand an adequately satisfactory definition, from a legal point of view, of the subjects who would take under those titles in a testamentary bequest; and certainly, even his sisters and his aunts might well fail to pronounce upon his "cousins." In its general sense, that term might include cousins of every description; but, according to the acceptation of the authorities, it means cousins-german, which in law, as well as in ordinary parlance, signifies "first cousins."[2] In Stoddart v. Nelson,[3] Stuart,

[1] Vol. 2, ch. 12.

[2] Sanderson v. Bailey, 4 Myl. & Cr. 56; Stevenson v. Abingdon, 31 Beav. 305; *Re* Parker, Bentham v. Wilson, 15 Ch. Div. 528; 43 L. T. (N. S.) 115.

[3] 6 DeG. M. & J. 68; 25 L. J. Ch. 116.

V. C., held, indeed, on the authority of a statement in the judgment in Caldecott v. Harrison,[4] but apparently against his own opinion, that first cousins once removed would be so included; but this decision was overruled by Lord Cranworth. Here, then, it may be asked what is a "first cousin once removed," and would he take under a bequest to "second cousins?" "By the former," writes Mr. Flood, in his admirable work on Wills of Personal Property, "is meant a child of a first cousin, so that if A and B are first cousins, and A has a son C, B and C are first cousins once removed; and in a bequest to 'first cousins or cousins-german,' of which A happened to be one, C would not be allowed to partake.[5] Supposing, in the above case, B has a son D, then he and C, the son of A, would be second cousins, who will take with first cousins once removed,[6] although if the testator distinctly combine first and second cousins as legatees, all will of course take, second cousins, and even first cousins twice removed." [7]

Now, in the recent case of *Re* Parker, Bentham v. Wilson, the testator gave his residuary personal estate; "one-third to my first cousins, and two-thirds to my second cousins;" and the question was raised whether "second cousins" meant second cousins strictly so called, or whether it also included children of first cousins (*i. e.*, first cousins once removed), it being contended that a gift to second cousins is to be construed as a gift to all persons related within that degree. In support of this contention the case, *inter alia*, of Charge v. Goodyer (above cited by Mr. Flood) was relied upon; but that case, said Jessel, M.R., "is an illustration of the danger of following authorities without looking at them. There the gift was to first and second cousins, and the report says: 'It was admitted that the bequest to first and second cousins, had it stood unmodified by any circumstance or expression, would have included all persons of the degree of second cousins; that is first cousins once removed and first cousins twice removed.' The cases of Mayott v. Mayott,[8] and Silcox v. Bell,[9] are there referred to, and throughout, this is spoken of as the legal construction of the gift, and in his judgment the Master of the Rolls gives no decision as to whether that was the legal construction, although, with all respect, it seems to me that that was the point before him." Equally unsatisfactory in support of the contention, the cases of Mayott v. Mayott and Silcox v. Bell were found to be on examination; while The Corporation of Bridgnorth v. Collins, Sanderson v. Bayley, and Stoddart v. Nelson, sustained the contrary view; so that the learned Master of the Rolls seemed fully fortified in the conclusion at which he arrived, that by second cousins was meant (in the absence of any controlling context) persons having the same great-grandfathers and great-grandmothers, and that first cousins once removed were not included. However, an appeal was taken before James, Brett and Cotton, L.JJ. (April 1, 1881), and, though not yet fully reported, the result of it has been thus stated in the *Law Times*:—"A bequest to 'second cousins' *simpliciter*, without a context, includes only second cousins strictly so called; and not persons standing within the same degree as second cousins, as, for instance, children or grandchildren of first cousins, commonly known as first cousins once and twice removed respectively. Where a testator gave one-third of his property to his 'first cousins,' and two-thirds to his 'second cousins,' and at his death left first cousins, second cousins, first cousins once removed, and first cousins twice removed: *Held*, (affirming the decision of Jessel, M. R.,)[10] that none but the first cousins and the second cousins strictly so called took under the gifts. *Quære*, whether the first cousins once and twice removed would have taken, if there had been one gift to the testator's first and second cousins?"[11] Another kind of uncertainty arose in Power v. Quealy,[12] where, lands having been devised "to the nearest and most deserving male cousin and a regular Power of the family," it was held that the eldest male cousin of the devisor, of the name of Power,

[4] 9 Sim. 457; 9 L. J. Ch. 331.
[5] Sanderson v. Bayley, *supra*.
[6] Corporation of Bridgnorth v. Collins, 15 Sim. 541.
[7] Charge v. Goodyer, 3 Russ, 140, judgment of Lord Lyndhurst, C.
[8] 2 B. C. C. 125.
[9] 1 Sim. & S. 301.
[10] 43 L. T. Rep. (N. S.) 115; L. Rep. 15 Ch. Div. 528.
[11] *Cf.* Lewin on Trusts, 121; Williams on Executors, 1226.
[12] 12 Ir. L. T. Dig. 35; 2 L. R. Ir. 227.

was entitled to take, the words "most deserving" applying in the sense of most worthy in point of succession. And for a curious case of *falso demonstratio* in reference to cousinship, etc., see Baxter v. Morgan.[13]

Nephews and nieces, also, are rather dubious personages, even when there is no doubt as to their being nephews and nieces; while it may be added that Jessel, M. R., in *Re Parker* dissented from Mayott v. Mayott, on the question of there letting in the testator's grandniece. In the recent case of Merrill v. Morton,[14] the testator devised lands to trustees to pay the rents to A. G. (sister of his late wife) for life, and after her decease to the children of the said A. G., and S. H. and E. A., and "my niece, Mary Williamson," in common. He devised other real estate in trust to sell, and pay the income of the proceeds amongst "all my nephews and nieces" for their lives and the life of the survivor, and bequeathed the investments to the survivor of "my said nephews and nieces." He made other dispositions in favor of his "said nephews and nieces." The testator left many nephews and nieces of his own, and nine of his wife. S. H., E. A., and Mary Williamson were all daughters of his wife's sister, E. W. Malins, V. C., held that neither Mary Williamson, though called a niece by the testator, nor any other of his wife's nephews and nieces, were entitled under the description "nephews and nieces." "It is said," he observed, "first, that the term 'nephews and nieces' includes the testator's wife's nephews and nieces, and for this proposition the case of Grant v. Grant[15] is cited. In that case the testator devised property to 'my nephew, Joseph Grant.' It appears that the testator's brother had a son named Joseph Grant, and that the brother of the testator's wife also had a son of the same name. The court considered that there was a latent ambiguity. With great deference to the Court of Exchequer Chamber, I can not concur in that view. There was not, in my opinion, any latent ambiguity, and I entirely agree with what the Master of the Rolls said in Wells v. Wells,[16] that the ordinary meaning of nephews and nieces is, a man's own nephews and nieces, that is, by consanguinity and not affinity. But, there is another point of much greater delicacy—namely, whether Mary Williamson can be included among the testator's nieces. I should have said on principle that, having called her his niece, the testator had included her in the class, but I am bound by authority to hold otherwise. In Sherratt v. Mountford,[17] the testator had no nephews or nieces of his own, and it was most properly decided that the wife's nephews and nieces were to be admitted under the description of nephews and nieces. After the decisions of Smith v. Lidiard,[18] and Wells v. Wells,[19] *supra* I can not hold Mary Williamson to be included among the testator's nieces." In addition to the authorities cited in the report of that case, see Drake v. Drake,[20] and Crook v. Whitley.[21] In Lucas v. Cuddy,[22] where the bequest was to the testator's "male nephews," it was held that nephews who were children of the testator's brothers were entitled in exclusion of nephews who were children of his sisters. And for a case where nephews and nieces entered into the fray about "that unfortunate case of Christopherson v. Naylor" (as Mr. Flood calls it, in the course of a discussion to which we would recommend attention), see Atkinson v. Atkinson.[23]

When words of relationship, so seemingly specific as those already mentioned, have formed the subject of extreme legal doubt, it is not surprising to find that others of a more general description, such as "family," have engendered a numerous offspring of fluctuating decisions.[24] But here it will suffice to mention the two latest cases on the subject—one of them Irish, the other American. In Bates v. Dewson,[25] the testator directed a house to be purchased and held in trust for the benefit of Dewson during his life, and to be conveyed to his (Dewson's) "family" at his death. It was held (Feb., 1880) that the gift in remainder to "his family" did not lapse by his death in the lifetime of the testator; and that "his family," in the absence

[13] 15 Ir. L. T. 139.
[14] 53 L. T. (N. S.) 750.
[15] L. R. 5 C. P. 727; 22 L. T. (N. S.) 829.
[16] L. R. 18 Eq. 504; 31 L. T. (N. S.) 16.
[17] L. R. 8 Ch. 928; 29 L. T. (N. S.) 284; 42 L. J. Ch. 688.
[18] 3 K. & J. 252.
[19] *Supra*.
[20] 8. H. L., 172; 29 L. J. Ch. 850.
[21] 7 De G. M. & G. 490; 26 L. J. Ch. 350.
[22] 10 Ir. L. T. Dig. 17; Ir. R. 10 Eq. 514.
[23] Ir. R. 6 Eq. 184.
[24] See Flood's Wills of Per. Prop., 512, 513, 698.
[25] 128 Mass. 334.

of words manifesting a different intention, must be taken to mean his widow and child, and not to include a step-son, although he had lived with and was supported by Dewson, and practically formed one of the family. And in *Re* Mulqueen's Trusts,[26] where the bequest was in trust "for my brother James' family," to be expended "for the benefit of said family," it was held that the children alone took, and the parents were excluded, following Barnes v. Patch.[27] As to the construction of the word "children," in reference to the rule in Wild's Case, see Clifford v. Koe.[28] Though so often called upon to affix a meaning to words of relationship in wills, executors are unfortunately too often ignorant of the rules of construction applicable, however well acquainted they may be with the general functions of their office, aided by the guidance of such useful works as Walker's Compendium of the Law of Executors, * * * * and Macaskie's Law of Executors and Administrators. * * * But the cases here collated exemplify only a few of the difficulties to which the use of such terms by testators gives rise; and while modern judges certainly seem to be gradually arriving at a fixed principle in questions of construction — that the well-defined legal meaning of words is not to be altered, unless there are circumstances in the nature of the gift, or by way of context, to show that the testator intended a different meaning — it would greatly add to the bounty of testators if they would only manage to spare its objects the calamity of litigation, by making their bequests *nominatim*. Happily for the lawyers, however, it is not likely that testators will ever cease to include an apple of discord among their bequests; though certainly disputes about wills are not so abundant as they appear to have been a couple of hundred years ago, when La Bruyere exclaimed, "If there were no wills settling the rights of heirs, there would, perhaps, be no need of tribunals to settle the differences of men. Judges would be well-nigh reduced to the melancholy function of sending to the gallows thieves and incendiaries."—*Irish Law Times.*

[26] 15 Ir. L. T. Rep. 33.
[27] 8 Ves. 604.
[28] 14 Ir. L. T. Rep. 79.

TAXATION — ENJOINING INVALID TAX — TENDER.

GERMAN NAT. BANK v. KIMBALL.

Supreme Court of the United States, October Term, 1880.

A party complaining of the assessment of a tax at a higher rate than authorized by law, can not have relief by injunction, until it appears that he has paid, or offered to pay, such amount as can be plainly seen he ought to pay, and this notwithstanding it may be impracticable to ascertain at the time the suit is commenced the precise amount which should be paid.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Mr. Justice MILLER delivered the opinion of the court:

This is a bill in chancery, filed by the appellant in the Circuit Court for the Northern District of Illinois, to enjoin the defendant, who was State tax collector, from enforcing payment of the taxes assessed against its shareholders on their shares of the bank stock. The general ground on which this relief is sought is two-fold, namely: that the assessment violates the provisions of the act of Congress concerning National banks, which forbids the States from taxing these shares at any higher rate than other moneyed capital within the State; and that it also violates the provision of the Constitution of Illinois concerning uniformity of taxation. The bill of complaint was dismissed on demurrer, and from that decree this appeal was taken.

The bill is made up of averments which are intended to show that the valuation of the property of other persons in the same town, made by the same assessor, is less in proportion to its actual cash value than that of plaintiff's shares; that the same is true in other parts of the State; that some corporations are favored in this valuation, and that certain classes of property are favored in a general way. But there is no distinct averment that the shares of this bank are valued higher for the purpose of taxation than other moneyed capital generally, though this is alleged in regard to particular instances. The allegations are pretty full that the assessments are partial, unequal and unjust, and do not result in the uniformity of taxation which the Constitution of Illinois requires. But we think there are two fatal objections to the bill. The first of these is, that there is no offer to pay any sum as the tax which the shares of the bank ought to pay. We have announced more than once that it is the established rule of this court, that no one can be permitted to go into a court of equity to enjoin the collection of a tax, until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be plainly seen he ought to pay: that he shall not be permitted, because his tax is in excess of what is just and lawful, to screen himself from paying

any tax at all until the precise amount which he ought to pay is ascertained by a court of equity; that the owner of property liable to taxation is bound to contribute his lawful share to the current expenses of the Government, and can not throw that share on others while he engages in an expensive and protracted litigation, to ascertain that the amount which he is assessed is or is not a few dollars more than it ought to be; but that before he asks this exact and scrupulous justice, he must first do equity by paying so much as it is clear he ought to pay, and contest and delay only the remainder. State Railroad Tax Cases, 92 U. S. 575.

The bill attempts to evade this rule by alleging that the tax is wholly void, and, therefore, none of it ought to be paid, and that by reason of the absence of all uniformity of values, it is impossible for any person to compute or ascertain what the stockholders of the complainant bank ought to pay on the shares of the bank. In the case above mentioned, this court said, in answer to the first objection: "It is clear that the road-bed within each county is liable to some tax at the same rate that other property is taxed. Why have not complainants paid this tax? It is said they resist the rule by which the value of their road-bed in each county is ascertained. But surely, they should pay tax by some rule. * * * * Should they pay nothing, and escape wholly, because they have been assessed too high? These questions answer themselves. Before complainants seek the aid of the court to be relieved of the excessive tax, they should pay what is due. Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them." Id. 616.

In the same case the court said: "It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice, nor irregularity, of themselves give the right to an injunction in a court of equity," and the authorities there cited support the proposition. The whole extent of the injustice complained of in this bill is the inequality of the actual assessment, and for this, it is argued, the whole tax of the township is void; and as the bill seeks to bring into view the inequality as regards other counties in the State, it follows that, if the bill be sustained, the entire tax of the State for that year must be declared void, in order that complainant may be relieved of a few thousand dollars and escape taxation for that year entirely.

In the case just referred to, this court said: "Perfect equality and perfect uniformity of taxation, as regards individuals and corporations, on the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect. And when we come to its application to the property of all the citizens, and of those who are not citizens, of a large State like Illinois, the application being made by men whose judgments and opinions must vary as they are affected by all the circumstances brought to bear upon each individual, the result must inevitably partake largely of the imperfection of human nature, and of the evidence on which human judgment is founded." Page 612.

These principles are sufficient to decide the case, and were declared by this court in a case arising in the same State and under the same Constitution and revenue laws with the one now before us. The case seems to have escaped the attention of counsel on both sides, as no reference is made to it in the briefs, though they are very full. In the recent case of People v. Weaver, 100 U. S. 539, and Pelton v. National Bank, 101 U. S. 143, and Cumming v. National Bank, I d. 153, an apparent exception to the universality of the rule is admitted. It is held in these cases, that when the inequality of valuation is the result of a statute of the State designed to discriminate injuriously against any class of persons or species of property, a court of equity will give appropriate relief; and also where, though the law itself is unobjectionable, the officers who are appointed to make assessments combine together and establish a rule or principle of valuation, the necessary result of which is to tax one species of property higher than others, and higher than the average rate, the court will also give relief. But the bill before us alleges no such agreement or common action of assessors, and no general rule or discriminating rate adopted by a single assessor, but relies on the numerous instances of partial and unequal valuations which establish no rule on the subject.

So far as anything of the kind is to be inferred, it is that shares of national bank stock, including plaintiff's, were assessed at only thirty-four per cent. of their value, which, by the board of equalization, was raised to fifty-three per cent.; and other property more, and still other less. The case, then, made by plaintiff is this: That the shares of the bank are taxed at the same per cent. on their assessed value as all other property; that the valuation of these shares, on which this rate is apportioned, is only about half their actual value; that some other property is valued at less than half of its cash value, and for this reason no tax should be paid on the shares of complainant's bank. And if any should be paid at all, the sum which may in the end be found justly due, and which, during the four or five years of this litigation, must be paid for the support of the government by some one else, shall remain in complainant's pocket until it is ascertained precisely to the last dollar what each share should have paid.

We think the circuit court did not err in dismissing such a bill, and its decree is affirmed.

NEGLIGENCE—STATUTORY PRESUMPTICN OF, WHEN REBUTTED.

RAILROAD CO. v. TALBOT.

Kentucky Court of Appeals.

Where a statute makes the killing or damaging of animals by cars along a railroad *prima facie* evidence of negligence, such presumption is rebutted when those presumed, from the circumstances of the case, to know whether there was negligence in fact, testify that there was no negligence, such witnesses being unimpeached, and there being no circumstances tending to contradict their statements as to the absence of negligence.

HINES, J., delivered the opinion of the court:

This action was instituted by appellees to recover damages for the alleged negligent killing, by the engine or cars of appellant, of a short-horned bull valued at $700. Judgment was for appellees in the sum of $500.

The evidence conduced to show that the bull was killed by some one of the train of cars operated by appellant on the night of May 11th, 1878, and that he was worth from $500 to $700. Here the appellees rested their case, and appellant then introduced as witness all of its employees who were connected with the management and running of all the trains passing the point at which the injury occurred, and on the night of the injury. All of these witnesses, seven in number, testify that they were in the proper discharge of their duty; that the trains were on time, and running at the usual rate of speed; and that they saw no stock and knew of no injury inflicted on stock by either of their trains.

The only question we will consider, is whether the evidence of negligence is sufficient to justify the finding of the jury. This involves the necessity of construing sec. 5 of chap. 57 Gem St., which is as follows: "That the killing or damaging of any horses or other stock, by the cars along said roads, or branches, shall be *prima facie* evidence of carelessnees and negligence of said company."

In the absence of statutory provisions to the contrary, the mere fact of killing is not enough to establish negligence. No one, while engaged in a lawful business, is responsible for inevitable accident resulting in injury, though the injury was the direct result or consequence of his own act; and when it is sought to recover for negligence, the burden of proof to establish it is on the one affirming its existence. In such case evidence, sufficient to raise a fair presumption of negligence, is enough to shift the burden of proof to the defendant, but until such evidence is introduced, the party complaining is without standing in court. The statute quoted is in derogation of this rule, and grows out of the difficulty ordinarily supposed to exist with the plaintiff in making proof of facts presumed to be peculiarly within the knowledge of the defendant or its employees. Therefore, whenever the conscience of those, in whose breast the fact, if in existence, is presumed to rest, is purged, the reason of the law changing the ordinary rule ceases, the *prima facie* case is overcome, and the plaintiff has failed to make out his case.

It appears to us that the only safe and just rule in a case arising under this statute is that the railroad company should be required, when in its power, to introduce as witnesses those employees who, from the circumstances of the particular case, would be presumed to know whether there had been any negligence on the part of the company; and when, unimpeached, such witness or witnesses testify that there was no negligence, and the circumstances do not contradict them, the law is for the defendant. To hold otherwise, would work manifest injustice and oppression, and would be a discrimination against one class of persons in favor of another whose rights of property are no more sacred.

In this case appellant could have done no more than was done. Every employee who could be presumed to know anything in reference to the matter was introduced, and testified, in effect, that there was no negligence. So far as this record shows, the witnesses are all unimpeached and unimpeachable, and there are no circumstances in the case tending to contradict the statements of these witnesses as to the absence of negligence.

Judgment reversed and cause remanded with directions for further proceedings consistent with this opinion.

NOTE.—We do not see how the soundness of this decision can well be questioned, unless it be conceded that a jury may, at pleasure, disbelieve uncontradicted and unimpeached witnesses. The Supreme Court of Iowa has recently held that a jury has no such arbitrary right. Starry v. R. Co., N. W. Rep., June 28, 1879, top page 119.

M. A. L.

CONSTITUTIONAL LAW—UNIFORMITY OF TAXATION—DELEGATION OF LEGISLATIVE POWER.

CLARK v. PORT OF MOBILE.

Supreme Court of Alabama, December Term, 1880.

A law requiring any foreign insurance company doing business within the State to pay such taxes, penlties and licenses over and above a sum certain, as shall be exacted from it by law in the State where it is organized, is unconstitutional and void: 1, as contrary to the requirements of uniformity of taxation; and, 2, as being a delegation of the legislative power to a foreign jurisdiction.

Appeal from the City Court of Mobile.

SOMERVILLE, J., delivered the opinion of the court:

This is a suit for a penalty of ten dollars imposed upon appellants by the Recorders' Court of the Port of Mobile, for alleged violation of a municipal ordinance of that city, requiring a license for the exercise of the privilege of carrying on the insurance business. The appellants were agents of the Columbus Fire and Insurance Company, an insurance corporation chartered under the laws of the State of Mississippi. The laws of that State require foreign insurance companies to pay a license tax of $1,000 to the State, to be received in lieu of all other taxes or licenses, which are prohibited to be exacted by any county or municipal authority. Code of Miss. (1880), §§ 585, 587. Section 1432 of the Code of Alabama (1876) requires all insurance companies, not incorporated under the laws of Alabama, to pay a license of $100 for the privilege of transacting any business of insurance in this State. But it is further provided by section 1440 as follows: "Whenever the existing or future laws of any State of the United States shall require of insurance companies incorporated by or organized under the laws of this State, or of the agents thereof, any deposit of securities in such State for the protection of policy holders or otherwise, or any payment of taxes, fines, penalties, certificates of authority, license fees, or otherwise, greater than the amount required for similar purposes from similar companies of other States, by the then existing laws of this State, then, in every such case, all companies of such States, establishing, or having heretofore established, an agency or agencies in this State, are required to make the same deposit for a like purpose with the treasurer of this State, for taxes, fines, penalties, license fees, or otherwise, an amount equal to the amount of such charges and payments imposed by the laws of such State upon the companies of this State and the agents thereof." The appellants, in accordance with the requirements of this section, paid the sum of $1,000 to the State treasurer, and obtained a license to carry on the insurance business in the State for one year, from May 13, 1880. They claimed that, under the terms of the above statute, they are relieved from paying any license to the municipal authorities of Mobile.

We do not think appellants can derive any protection from this statute, as, in our opinion, it is clearly incompatible with several provisions of the Constitution of the State, which the courts are compelled to regard as the "paramount law and the highest evidence of the will of the people." Potter's Dwarris on Stat. and Const., 66, 67. It is, in the first place, violative of those clauses having reference to that uniformity of taxation required in assessing the property of private corporations and individuals. Section 6, of Art. XI.

We do not mean to intimate by these views that the legislature has no constitutional power to select, in its discretion, the subjects of State and municipal taxation. "The constitutional requirements of equality and uniformity only extend to such objects of taxation as the legislature shall determine to be properly subject to the burden. The power to determine the persons and the objects to be taxed is trusted exclusively to the legislative department; but over all those objects the burden must be spread, or it will be unequal and unlawful as to such as are selected to make the payment." Cooley's Const. Lim., 515. The section of the Code under consideration (§1440) is void, furthermore, for another reason. It is in effect a delegation of legislative power. The framers of the Constitution have vested the law-making power of this State exclusively in the General Assembly. Const. (1875), Art. IV, §1. No principle is better, and, perhaps, more wisely settled as a maxim of constitutional law, than that "the power conferred upon the legislature to make laws can not be delegated to any other body or authority." Cooley's Const. Lim., 116, 117. The people have reposed the power there, and it can not be transferred to any other person, state or nationality. This section of the Code authorizes, in effect, the legislature of Mississippi, speaking through its statutes, which are the subjects of extrinsic proof and not of judicial knowledge in our courts, to fix by law the amount which the treasurer of Alabama shall demand of appellants as a license tax to do an insurance business in this State. If the law-making power of that State should in a day modify, amend or repeal their revenue laws, *ipso facto*, such legislative action would modify, amend or repeal the legal operation of our own laws, provided the principle contended for by appellants' counsel is a sound and prevailing one. This can not be, for it would be confiding to a foreign jurisdiction that legislative discretion which the General Assembly of Alabama are constitutionally bound to exercise themselves, and which they can not delegate or commit to another. They are not permitted to "substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust." Cooley's Const. Lim., 117; Thorne v. Cramer, 15 Barb. 112; State v. Ware, 33 Iowa, 134; s. c., Amer. Rep., 113; Bart v. Himrod, 8 N. Y., 483. If a law should be passed, entitled "an act to authorize the legislature of Mississippi to fix the amount of the license tax to be required of insurance companies organized under the laws of that State and doing business in Alabama," the objection would be obvious on first impression. Yet this is the necessary and practical effect of the statute as it now stands, subject to the sole limitations that the license could not be less than the sum of one hundred dollars, as required of foreign insurance companies generally by § 1432 of the Code.

This statute, under which the license of appellants was issued, being void for the reasons mentioned, it furnishes no exoneration from liability to pay such additional license, as any municipal

authority may be authorized by law to require of all insurance agents or companies. The city court did not err in sustaining the action of the recorder, and the case is affirmed.

NOTARY PUBLIC— ACKNOWLEDGMENT A JUDICIAL ACT.

COMMONWEALTH v. HAINES.

Supreme Court of Pennsylvania, May 2, 1881.

The certificate of a notary public of the acknowledgement of a deed or mortgage is a judicial act. The notary, who has been imposed upon by a personation, is liable only for a clear and intentional dereliction of duty; and in the absence of such evidence he is protected by the legal presumption that he did his full duty. A mere mistaken conclusion imposes no liability on him.

John G. Johnson, for plaintiff in error; *Jos. M. Pile* and *S. C. McMurtrie*, for defendants in error.

Error to the Court of Common Pleas No. 2 of Philadelphia County.

MERCUR, J., delivered the opinion of the court:

This action was against a notary public and his sureties on his official bond. The complaint is, that he certified to one Abram P. Beecher having personally appeared before him, and, in due form of law, acknowledged a certain indenture of mortgage to be his act and deed, when, in fact, the person who appeared before him and made the acknowledgment was not Abram P. Beecher, whereby said plaintiff was injured.

The plaintiff called Abram P. Beecher, who owned the lot described in the mortgage on which the notary made the certificate. He testified, that this mortgage was not executed by him, nor by his authority, and that he never made any acknowledgment thereof, or of any mortgage on that property before the notary, or before any person.

The plaintiff testified that, relying on the supposed validity of the mortpage and the record thereof, he bought and paid for the mortgage.

The question to be considered is, what proof is necessary to make the notary legally liable to one injured by the making of such certificate, untrue in fact? It is well settled that the certificate of a judge, or of a justice of the peace, of the acknowledgment of a deed or mortgage, is a judicial act. Withers v. Baird, 7 Watts, 227; Jamison v. Jamison, 3 Whar. 457; Heeler v. Glasgow, 29 P. F. Smith, 79; Singer Manufacturing Co. v. Rook, 3 Norris, 442.

Conceding such to be the effect of a certificate of a judge or justice, yet it was contended, on the argument, that like effect should not be given to the certificate of a notary. Why not? He is a public officer, commissioned by the Governor. He is acting under oath like other officials in the performance of judicial duties, to "well and faithfully perform the duties of his office." The second section of the act of 10th of August, 1864, Pur. Dig. 1097, expressly gives power to "each notary public of this Commonwealth," *inter alia*, "to take and receive the acknowledgment or proof of all deeds, conveyances, mortgages or other instruments of writing, touching or concerning any lands, tenements or hereditaments situate, lying and being in any part of this State, * * * * as fully to all intents and purposes whatsoever, as any judge of the Supreme Court, or president or associate judge of any of the courts of common pleas, or any alderman or justice of the peace within this Commonwealth." As then the notary is authorized to take the acknowledgment as fully, to all intents and purposes, as a magistrate can do, it follows the same effect should be given to his certificate of acknowledgment. It was so held in Hornbeck v. Building Association, 7 Norris, 64. Whatever officer is authorized to take the acknowledgment, to him is given a judicial duty, and when he performs it, it becomes a judicial act, and has the effect of a record.

This action, then, is to recover damages flowing from the incorrect manner in which the defendant performed a judicial act. The rule as to the liability of an officer performing a ministerial duty does not apply.

The plaintiff also called and examined the defendant notary. He testified that, at the time of putting his hand and seal to the acknowledgment, he did not know Abram P. Beecher; did not remember that he had ever seen or heard of him before; had no knowledge of the matter, except what appears on the acknowledgment; frequently some one whom he knew brought in the person and introduced him; he was satisfied at the time it was all right; but does not remember what took place. He added, "the paper was undoubtedly signed before me; I don't remember that I did or did not take any precaution to identify the person making the acknowledgment; but I know I must have been satisfied at the time. The substance of his evidence, therefore, is, that while he does not recollect what inquiries or statements were made, yet he knows he must have been satisfied as to the identity of the person, and that it was all right at the time the acknowledgment was taken. No evidence was given conflicting with or impairing this evidence of the defendant. The legal presumption is he acted on reasonable information, and did his full duty. His absence of memory as to the details of what occurred does not destroy that presumption. The burden of proof is on the plaintiff to prove a clear and intentional dereliction of duty; that is neither proved nor averred. A mere mistaken conclusion imposes no legal liability on the defendant. The learned judge was clearly right in ordering a compulsory non-suit and in refusing to take it off.

Judgment affirmed.

INSURANCE FOR SOLE BENEFIT OF WIFE UNDER MISSOURI STATUTE—HUSBAND INSOLVENT — RIGHTS OF WIFE AND CREDITORS.

PULLIS v. ROBINSON.

Supreme Court of Missouri, April Term, 1881.

1. Under sec. 15, Wagner's Statutes, p. 936, which provides "that a married woman may cause to be issued for her sole use a policy of insurance on the life of her husband, and, in case she survives him, that the insurance money shall be payable to her free from the claims of the representatives of her husband or any of his creditors, but such exemption shall not apply when the amount of premiums shall exceed $300:s' *Held*, that this statute does not restrict the right of a solvent husband to apply only $300 of his means annually to the payment of premiums on his life policy procured for the benefit of his wife; the purpose of the statute being to allow a husband who might be in an embarrassed, or even in an insolvent, condition to secure to the wife the benefit of an insurance on his life free from the claims of creditors, when the annual premium on such policy does not exceed the sum of $300.

2. In a contest between the wife and the creditors of the husband for the insurance money, where the premiums paid were in excess of $300: *Held*, that the wife should have so much of the fund as was produced by the payment of the premiums by the husband when solvent, and the creditors so much as was produced by the premiums so paid by the husband when insolvent.

3. The creditor who first files his bill asking an appropriation of the insurance money to the payment of his demand, thereby obtains a priority over other creditors, and is entitled to be first paid from the fund.

Appeal from St. Louis Court of Appeals.

Cline, Jamison & Day and *Schulenberg*, for appellants; *A. W. Slayback*, for respondent.

NORTON, J., delivered the opinion of the court:

This is a proceeding in the nature of a creditor's bill, instituted by certain creditors of James P. Robinson, deceased, whose claims had been allowed by the probate court against his estate, to subject to the payment of said debts the proceeds of certain policies of insurance taken out on the life of said Robinson, and made payable to his wife. The creditors suing are three in number, and, each having brought a separate action, the three suits were consolidated and tried together. Three of the policies, the proceeds of which constitute the subject-matter of controversy, were issued by the Mutual Benefit Life Insurance Company, each of them being for $5,000, and dated respectively February 26th, 1867; February 21st, 1868, and May 12, 1870. The amounts of annual premiums were as follows: $283 on the one dated in 1867; $263 on the one dated in 1868, and $289 on the one dated in 1870. The plaintiffs claim and allege in their bill that Robinson was in embarrassed circumstances, and, at the times the premiums were paid, he was insolvent, and that said policies were donated to his wife, and were procured for the purpose of hindering, delaying and defrauding creditors. Defendant, Mrs. Henrietta Robinson, to whom said policies were made payable, denies all the allegations of the bill, and asserts her right to the proceeds of the same. Upon the trial of the issues thus tendered, the court found that said Robinson was solvent at the time said policies were taken out, and remained solvent till about the year 1876; that the payment of the two last premiums on two of said policies, amounting to $342.35, dated respectively in 1867 and 1868, which payment occurred in 1876, was made by Robinson while he was insolvent, and that the payments anterior to 1876 were made by Robinson while he was solvent. Upon this finding the court decreed that Mrs. Robinson was entitled to the proceeds of the policies, less the amount of premiums paid by Robinson when insolvent, with the interest thereon; and also decreed that Mr. Pullis, the plaintiff who first brought suit, was entitled te the whole amount of the premiums paid in 1876, with its interest. From this judgment plaintiffs appealed to the St. Louis Court of Appeals, where the judgment was affirmed, and from this judgment they appealed to this court. The evidence adduced on the trial, we think was sufficient to justify the trial court in finding the facts above set forth, and we will, therefore, accept its finding as correct; and, thus accepting it, the question presented for our determination is, whether on the facts, the court in its decree, properly disposed of the fund in dispute. Plaintiffs insist that error was committed in this respect, and contend that the premiums paid by Robinson in 1876, being in excess of the sum of $300, and having been paid while he was insolvent, out of funds which ought to have been appropriated to the payment of debts, entitles them to so much of the proceeds of the policies as may be necessary to satisfy in full their claims as creditors, even though it should consume it all.

We think it settled that a wife has such an interest in the life of her husband as to make valid an insurance effected on his life for her benefit. This has been so held in the case of Gambs v. Covenant Mutual Life Insurance Co., 50 Mo. 44. We think it also settled that when such a policy issues and expressly designates a person who is to receive the insurance money, such designation is conclusive, unless some question arises as to the rights of creditors of the person who paid the premium. "The receipt of the designated person will discharge the company, and such person will be entitled to maintain an action against the company." Bliss on Insurance, sec. 317. We think it also settled that a husband who is solvent has the right to effect an insurance on his life for the benefit of his wife, and to pay the annual premiums thereon, so long as he remains solvent, and can do so without prejudice to or in fraud of the rights of creditors. Larkin v. McMullin, 49 Pa. St. 29. To what extent, if to any, the husband

can affect the rights of the wife in such a policy by an assignment or other disposition of it, is a question which does not arise in this case, and we have, therefore, deemed it unnecessary to notice the numerous authorities cited by counsel bearing on that point. The interest of the wife in a policy of insurance on the life of her husband, effected for her benefit by the husband while in unembarrassed circumstances and fully able to discharge all of his indebtedness, is not affected, as plaintiffs contend it is, by sec. 15, Wagner's Statutes, p. 936, if the husband remains solvent during the time the policy is kept alive, by his paying the annual premiums. That section provides that a married woman may cause to be issued for her sole use a policy of insurance on her husband, and in case she survives him, that the insurance money shall be payable to her free from the claims of the representatives of the husband or any of his creditors; but such exemption shall not apply when the amount of premiums annually paid shall exceed $300. We do not think this statute can be so interpreted as to curtail or restrict the right of a solvent husband to apply only $300 of his means annually to the payment of premiums on his life policy procured for the benefit of his wife. It is insisted that this interpretation has been put upon it in the Charter Oak Life Ins. Co. v. Brandt, 47 Mo. 425. We do not think the opinion goes to that extent, and if it did, we would be unwilling to follow it, and thus give it our sanction. In that case, the point in judgment was as to the validity of an assignment of a policy, on which the annual premium was $343, and which had been taken out on the life of Mrs. Brandt's husband, payable to her sole and separate use after her husband's death. This policy was assigned by Brandt and his wife to secure the payment of a debt which Brandt owed one Stagg for borrowed money. The court held the assignment to be valid, because the annual premium being in excess of $300 prescribed by the statute took it from under the operation of the statute. The remarks made in the opinion, "that the law did not intend that the husband should withdraw any greater amount from his means to be expended for such a purpose," if it is understood as referring to a withdrawal of the means of an insolvent husband, and the expenditure made thereof by him for such a purpose—and such we take to be its meaning—is entirely correct. It was certainly not intended, as counsel insists, to assert that if a husband who is perfectly solvent, with no intent to defraud creditors, either prior or subsequent, applies more than $300 annually of his means in the payment of premiums on an insurance of his life, to be paid to and for the benefit of the wife, although, after such payments are made, sufficient of his property is left to answer the demands of his creditors, that such creditors can subject the insurance money to the payment of their debts, and thus deprive the wife of the benefits intended to be secured to her. We think it was the purpose of the statute to allow a husband, who might be in an embarrassed or even in an insolvent condition, to secure to the wife benefit of an insurance on his life free from the claim of creditors when the annual premium on such policy does not exceed the sum of $300; or, in other words, that he might annually withdraw for such a purpose that sum without subjecting the amount insured to the payment of creditors.

Previous to the enactment of the statute, an insolvent husband could not apply any portion of his means to such a purpose, and deprive creditors of the right of asserting their claims to all the benefits resulting from such application. The object of the statute in our opinion was to change this rule to the extent indicated in the act. It follows from the view we have taken that, inasmuch as all the premiums paid by Robinson, except the sum of $343 paid in February, 1876, were paid while he was solvent; that Mrs. Robinson is entitled to the benefits resulting therefrom, and that the last payment being in excess of $300 and made while Robinson was insolvent, should go to the benefit of plaintiff. It is insisted by counsel that inasmuch as the payment made in 1876 kept the policies on foot and gave them vitality, that the whole amount of the insurance money, or so much thereof as will be sufficient to satisfy their debts, should be applied. We have not been cited to, nor have we been able to find, any authority that goes to that extent, nor are we acquainted with any equitable principle on which the claim can be founded. How the insurance money under the facts and circumstances of this case should be apportioned, presents a question of some difficulty, especially so as the authorities we have been able to examine are conflicting in the rules laid down. The case of Landrum v. Knowles, 22 N. J. Eq., goes further in support of plaintiff's position than any which has fallen under our observation, and it falls far short of what is contended for by them. In that case the wife insured the life of her husband for the benefit of her children, and, after paying the annual premiums for about ten years, assigned the policy, in conjunction with her husband, to one of the husband's creditors in payment of the debt; after said assignment, the wife ceased to pay the premiums, but they were paid for about nine years by the creditors. Upon the death of the husband, the insurance money was claimed by the children on the one hand, and the assignee on the other, and the chancellor decreed that the children were entitled to the cash value of the policy at the time it ceased to be kept alive by the mother, and that the residue of the money due on the policy should be paid over to the assignee. On the other hand, in the case of Trough's Estate, 8 Phila. R., 215, where Trough, having taken out a policy on his life, assigned the same, while solvent, to a trustee for the benefit of his children, and becoming insolvent thereafter, still continued to pay the premiums, in a contest for the insurance money between the children and

Trough's creditors, the rule was laid down that the only claim the creditors could sustain would be the amount of the premiums paid by Trough to keep the policy alive after he became insolvent. The object of such rules being to do exact justice between the contending parties, and to distribute the funds according to their rights, it appears to us that neither of the above rules accomplishes the object; and inasmuch as the insurance money in contest in this case was the product of all the premiums paid, we think that a just distribution of it would be obtained by declaring that Mrs. Robinson should be decreed to have so much of the fund as was produced by the payment of the premiums by her husband when solvent, and plaintiffs so much as the premiums paid by Robinson, when insolvent, contributed to produce—that is, that plaintiffs are entitled to recover the same proportional part of the whole insurance money that the premiums paid by Robinson when insolvent, bear to the premiums paid by him when solvent. Giving effect to this rule in the disposition of the case, and accepting the fact found by the court, that Robinson, after his insolvency, paid $342.15, as being correctly found, and the further fact as shown by the record, that Robinson had paid on two of said policies during his solvency premiums amounting to $4651, plaintiffs would be entitled to recover the sum of $686.84, and Mrs. Robinson the residue. As plaintiff Pullis in the race of diligence was the first to file his bill, asking an appropriation of the fund to the payment of his demand, he has obtained a priority over the other creditors, and the said sum of $686.84 should be applied on his debt. George v. Williamson, 26 Mo. 193.

The judgment will be reversed and cause remanded, with directions to the circuit court to enter up a decree in conformity with this opinion, directing the receiver in whose hands the fund has been placed to pay first the costs of the suit, next the sum of $686.84 to plaintiff Pullis, and next the residue to defendant, Mrs. Robinson. All the judges concur.

ABSTRACTS OF RECENT DECISION.

SUPREME COURT OF THE UNITED STATES

October Term, 1880.

APPELLATE PRACTICE—DISMISSAL OF PREVIOUS APPEAL OR WRIT OF ERROR.—Rule 6, par. 4, as amended November 4, 1878, 97 U. S. vii, provides that there may be united with a motion to dismiss a writ of error or appeal a motion to affirm, on the ground that, although the record may show that this court has jurisdiction, it is manifest the appeal or writ of error was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument. This is a modification of the rule as originally promulgated May 8, 1876, 91 U. S. vii, when it was confined to motions to dismiss writs of error to a State court, In Whitney v. Cook, 99 U. S. 607, we held that to justify a motion to affirm under this rule, there must be a motion to dismiss and at least some color of right to a dismissal. In Stewart v. Salamon, 97 U. S. 362, we decided that if an appeal was taken from a decree entered on our mandate upon a previous appeal, we would, on the application of the appellee, examine the decree entered, and if it conformed to the mandate, dismiss the case, with costs. The motion to dismiss in this case was apparently based upon that ruling. It seemed to us, when it was up for hearing, to have been made in good faith; and while we did not think it ought to be sustained, we could not say it was without any color of right. For that reason we felt at liberty to look into the motion to affirm. The record in this case showed that Hinckley was appointed receiver in the Kelly suit November 24, 1879, and that his receivership ended by his turning over the property to the trustees of the mortgage on the 12th of August, 1875. The record of the former appeal, to which we may with propriety look, as the order now appealed from was made upon a petition of intervention filed in that cause, shows that in the settlement of accounts then made Hinckley was paid for his services during the whole period of his receivership, that is to say, from the date of his appointment in the Kelly suit until his final discharge. We are still of the opinion that the case is a proper one for the application of our rule in respect to motions to affirm, and, therefore, deny the petition for a rehearing. Opinion by Mr. Chief Justice WAITE. *Hinckley v. Morton.*

APPELLATE PRACTICE — WHAT IS A FINAL DECREE IN A PARTITION SUIT.—This is a motion to dismiss an appeal in a partition suit, because the decree appealed from is not final, and also, because the value of the matter in dispute does not exceed $5,000. The appellees, complainants below, claim to be the owners each of one-eighth of the property to be divided, which, it is admitted, is worth only $10,000. In the petition it is alleged that the value of the annual income was $5,000, and an account of the revenue is asked as well as a partition. This suit, like the other, was begun in a State court, and removed by Green to the circuit court, where, by an express order, it was put on the equity docket, and a change in the pleadings directed so as to make it conform to rules govering equity cases. The decree appealed from simply adjudges that the appellees are the owners each of one-eighth of the property, and refers the matter "to J. W. Gurley, Esq., master, to proceed to a partition according to law, under the directions of the court." As was decided in the other case, this is not a final decree; but if it was, we would be without jurisdiction, because the property only has been adjudged to the appellees, and the value of that is

less than the amount required to bring a case here. There has been no order even for an accounting, and as yet we are not advised there ever will be one; much less that, if it should be made, a balance would be found due from the appellants sufficient to make the value of the matter in dispute on an appeal by him such as our jurisdiction requires. As the appellant, to sustain his appeal, must show affirmatively that more in pecuniary value than our jurisdictional requirement has been adjudged against him, he has failed to make a case for us to consider. The motion to dismiss is granted. Opinion by Mr. Chief Justice WAITE.—*Green v. Fisk.*

TOWN-SITE ACT—ABANDONMENT—LAPSE OF TIME.—This case can not be distinguished in principle from Stringfellow v. Cain, 99 U. S. 610. The finding is, that the property now claimed by Folsom was sold at public sale on the 11th of March, 1860, to raise money to pay a debt owing by the deceased father of the appellees, who was the original occupant of the premises. The price was $510, which was more than the debt. The overplus was paid the mother of the appellees, who were at the time all minors living with her in a house built by the father on an adjoining part of the lot for a residence. The purchaser took possession immediately after the sale, and when the town-site was patented under the town-site law, in November, 1871, Folsom, his grantee, had himself been in the actual occupancy of the property for more than ten years, and during that time had made valuable improvements. This, as we think, under the rule in Stringfellow v. Cain, makes out a case of abandonment on the part of Mrs. Lamareux and her children, and gives Folsom a right to claim title. It is true, the original sale was without the consent of Mrs. Lamareux, but it was with her knowledge. She afterwards took a part of the purchase-money, and suffered Folsom to occupy and improve the property as his own for more than ten years without objection, so far as the findings show. Under these circumstances neither she nor her children can claim that Folsom was in as a trespasser, when the title to the town-site was secured from the United States for the "use and benefit of the occupants thereof, according to their respective interests." Folsom was not an intruder on their occupancy, but was himself a lawful occupant. The evidence satisfies us that the value of the property in dispute is more than $1,000; we, therefore, have jurisdiction. The judgment against Folsom, who is the only appellant, is reversed, and the cause remanded with instructions to enter, or cause to be entered, a judgment in his favor for the premises claimed by him. Appeal from the Supreme Court of Utah. Opinion by Mr. Chief Justice WAITE.—*Folsom v. Dewey.*

SUPREME COURT OF MISSOURI.

May, 1881.

INSTRUMENT INDEMNIFYING SURETY, WHEN ACTION LIES THEREON—ATTACHMENT—JUDGMENT THEREON.—To an action against A R and I H R, on a written contract signed by them to pay plaintiff the sum of $1,153, the answer set up that said instrument was given for the sole purpose of indemnifying plaintiff against loss by reason of his suretyship for defendant, A R, on a note to one A and other persons named; that said debt of A R to A and others remained unpaid, and that plaintiff had never paid any part of it, and that until such payment by him the obligation in said suit was without consideration. *Held*, that an instruction asked by plaintiff embracing the proposition of law contained in said defense should have been given. In an attachment suit where the parties are summoned to appear to the action, while the judgment should be a general one, it is error to condemn the attached property to be sold, "as under such a judgment the attached property need not be necessarily sold. If there is other property sufficient to satisfy the execution, the defendant may surrender it, and have the attached property if he wills it." Kritzer v. Smith, 21 Mo. 296; Jones v. Hart, 60 Mo. 351. Reversed and remanded. Opinion by NORTON, J.—*Borum v. Reid.*

EJECTMENT—REMITTITUR—COSTS.—This was an ejectment for an undivided sixth part of some lands in Clark County. The recovery was in excess of that prayed for in the petition, the recovery being for all the land, while the prayer of the petition was for only an undivided sixth part. The plaintiff filed a *remittitur* for the excess, and the judgment of the circuit court less the excess remitted is affirmed, and costs of appeal adjudged against plaintiff. Miller v. Hardin, 64 Mo. 545. Opinion by NORTON, J.—*Peck v. Childers.*

BILL OF EXCEPTIONS—MOTION FOR A NEW TRIAL.—Errors which only constitute matters of exception, and not arising on the face of the record proper, will not be noticed in the Supreme Court, if the motion for a new trial is not incorporated in the bill of exceptions, the same rule applying in criminal as in civil cases. The evidence so far as preserved was offered simply to show that defendant had been tried and convicted for the same offense by the town authorities of Poplar Bluff, but did not show that such was the case. State v. Wister, 62 Mo. 592. Affirmed. Opinion by SHERWOOD, C. J.—*State v. Dunn.*

STATUTORY CONSTRUCTION—WORDS "GRANT," "BARGAIN" AND "SELL."—The words "grant," "bargain" and "sell," when employed in a conveyance, are only to be construed as a statutory covenant of warranty against "incumbrances done or suffered by the grantor, or any person claiming under him," and do not extend to outstanding incumbrances over which the grantor in the given conveyance has no control. Armstrong

v. Daily, 26 Mo. 517; Clore v. Graham, 64 Mo. 249. For this reason the first count in the petition stated no cause of action; and the deed, offered in evidence to sustain the second count, did not have that effect. Affirmed. Opinion by SHERWOOD, C. J.—*Koenig v. Branson.*

ASSIGNMENT OF INVENTION—WHERE NO PATENT HAD ISSUED—EVIDENCE—FAILURE OF CONSIDERATION.—This was an action to recover the sum of $1000 alleged to have been paid by plaintiffs to defendants for a patent right for an "improved self heating smoothing iron," known as the "Askin Rotary Smoothing Iron," and the right to sell said invention in certain territory in this State. Among other things it is alleged in the petition, as a ground of recovery, that the pretended invention or patent right, sold by defendants to plaintiffs, was never patented by the United States, and that the consideration for which the said money was paid had wholly failed. All the allegations of the petition were denied. On the trial plaintiff offered in evidence the assignment of the invention, and also offered to introduce evidence to show that the invention had never been patented by the United States, and closed his case, and the court thereupon nonsuited the plaintiff. *Held*, it appearing from the assignment of the invention, that plaintiffs intended to buy and defendents to sell, the right to vend within the prescribed territory an invention which had been patented, and the assignment of territory in which the right to sell being something more than a mere release or quit claim of defendant's interest, and implying that a patent in due form had been issued by the United States. Curtis on Patents, 184; 6 Cent. L. J. 53; Strong v. Barnes, 11 Vt., 221. The evidence tending to show that no patent (which was the thing sold) had ever issued, the thing sold had no existence, and there was a total failure of consideration, and plaintiffs on this ground were entitled to recover. Reversed and remanded. Opinion by NORTON, J.—*Shepherd v. Jenkins.*

SUPREME COURT OF GEORGIA.

May, 1881.

EVIDENCE IN CRIMINAL CASES—TESTIMONY OF ACCOMPLICE—CORROBORATION.—To warrant a conviction based on the testimony of an accomplice, the corroborating circumstances should be such as, independently of his testimony, to lead to the inference that the defendant is guilty. Facts which merely cast on the defendant a great suspicion of guilt are not sufficient. Judgment reversed. Opinion by SPEER, J.—*McCaila v. State.*

CRIMINAL LAW—EVIDENCE OF CO-CONSPIRATOR — LARCENY — QUESTION FOR JURY OF AMOUNT STOLEN.—1. In cases of crimes perpetrated by several persons, when once the conspiracy or combination has been established, the act or declaration of one conspirator or accomplice in the prosecution of the enterprise is considered the act or declaration of all, and, therefore, imputable to all. 2. The indictment charging a larceny of more than $50 in money, and there being testimony to support the indictment (including a restoration of the full amount lost)—though only one bill of $50 was specially identified—there was no error in leaving the jury to decide the amount stolen as well as other facts, that is, whether the larceny was more than $50 or not. Judgment affirmed. Opinion by SPEER, J.—*Horton v. State.*

MANDAMUS — WHEN BANK OFFICIAL IS A "PUBLIC OFFICER."—*Mandamus* will not lie to compel the officers of a bank to transfer stock from a vendor to a purchaser, except under a judicial sale; in that case the bank official becomes a public officer *pro hac vice*. Judgment reversed. Opinion by SPEER, J.—*Bank of Georgia v. Harrison.*

COMMON CARRIER—CONTRACT LIMITING THE LIABILITY FOR THE CARRIAGE OF LIVE STOCK.—1. A railroad company transporting live stock may contract with the shipper for a consideration that the company shall be released from all liability for damages accruing to the stock disconnected and apart from the conduct or running of the trains; as from overloading, suffocation, heat and the like. 2. Whether a contract to release the company from damages resulting from the conduct or running of its trains would be contrary to public policy, *quære*? Judgment reversed. Opinion by Speer, J.—*Georgia R. Co. v. Beatie.*

SUPREME COURT OF OHIO.

April, 1881.

EQUAL EQUITIES—PRIORITIES.—1. As between persons having equitable interests, if their equitable interests, if their equities are in all other respects equal, the eldest in point of time will prevail, but this rule does not apply when the junior equity is superior in merit. 2. K., having the legal title to land subject to a vendor's lien in favor of D., sold and undertook to convey the same to H., for a valuable consideration, but the deed was defective as a conveyance of the legal title, because the officer taking the acknowledgment omitted to subscribe the same. The court, on the sole ground that the vendor's lien was the elder equity gave it the preference. *Held*, error. 3. If under all the circumstances of the case, the equity of H acquired by his purchase, and by the defectively executed conveyance, is superior in merit to that of the vendor's lien, it should have priority. Judgment reversed and cause remanded. Opinion by JOHNSON, J.—*Hume v. Dixon.*

CONSTITUTIONAL LAW — CREATION OF OFFENSES.—1. The only limitations to the creation of offenses by the General Assembly, are the guaranties contained in the bill of rights. 2. These guaranties are not infringed by sec. 2108 of the Revised Statutes, which authorizes cities and villages to provide for the punishment of known thieves, pick-pockets, watch-stuffers, etc. 3. An ordinance under this statute, providing for the punishment of any known thief found in the municipality, is valid. The order of the probate court discharging the defendant in error from custody reversed. Opinion by WHITE, J.—*Morgan v. Nolte.*

NOTARIES PUBLIC — RETROACTIVE LAWS.—Sec. 16 of the act of March 13, 1858, concerning notaries public, which declares that an act done by a notary public after the expiration of his term of office shall be valid, is not retroactive. Hence, an unauthorized acknowledgment of a deed taken before the act was passed, is not cured by it. Judgment affirmed. Opinion by WHITE, J.—*Bernier v. Becker.*

DEED TO BE DELIVERED AFTER DEATH—TO TAKE EFFECT, WHEN.—1. Where a grantor in a deed delivers the same to a third person as his deed, to be delivered to the grantee at the death of the grantor, and the deed is accordingly delivered to the grantee upon the grantor's death, the title passes to the grantee as of the date of the first delivery. Affirmed. Opinion by BOYNTON, C. J.—*Ball v. Foreman.*

WILL—DEVISE—IMPERFECT DESCRIPTION OF LAND.—1. Where property is devised by two descriptions, either of which is sufficient in form, but it being shown that one of them is erroneous and the other correct, the former should be rejected, and the property will pass by the latter description, according to the maxim, *Falsa demonstratio non nocet.* 2. A devised his lands to B for life in the following words: "All the * * * real estate I may die seized of." He owned 160 acres of land, and no more, one-half of which was in section 27, and the other moiety was the east half of the north-east quarter of section 28. He devised the portion in section 27, by a correct description, to C, at the death of B, charged with certain legacies, and devised the portion in section 28 to D at the death of B charged with certain legacies, but by mistake in the particular description of the land devised to D, the word South was inserted instead of North: *Held*, that so much of the description as is erroneous should be rejected, and that the land will pass to D, on the death of B, by the other provisions of the will. Affirmed. Opinion by OKEY, J.—*Merrick v. Merrick.*

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

1. Can the common practice of circuit judges of Missouri in allowing the sheriff pay for one or two deputies during the sitting of courts be justified? Has a court the right to say that one or two deputy sheriffs, or bailiffs, are "necessary for the use of the court whenever ordered by the court," and thus force the several counties to pay for them. See sec. 1061 of Revised Statutes; Couch v. Plummer, 17 Mo. 421. Will some learned judge answer: Can the court order the sheriff to furnish deputies. Amicus Curiæ.

Kahoka, Mo.

2. Sec. 510 of the Practice of the State of Indiana, says that the sheriff shall make return of all his doings there according to the facts; and sec. 517 says that the clerk shall enter at length the return of the sheriff, and such docket entries shall be taken and deemed to be a record. Now if the sheriff should say in his return that he offered the rents and profits of a certain tract of land that he was not ordered to sell, in selling a particular piece, and a record is made, in a suit between the parties to the judgment, can he, by parol, dispute his record, whether the same be true or not? F.

Tipton, Ind.

QUERIES ANSWERED.

Query 28. [12 Cent. L. J. 504.] In 2 Kent Com. 509, on the authority of which DesArts v. Leggett, 16 N. Y. 582, cited in 2 Parsons on Notes and Bills, 623, was decided, it is stated that where a debtor makes a tender of goods and the tender is refused, if he elects to retain possession of the goods, it is in the character of bailee to the creditor. Is not the case wanting in two of the requisites of a bailment, *viz.*: A contract and a delivery? D.

Cedar Falls, Iowa, May 21, 1881.

Answer. No. The person making the tender may abandon the goods if he chooses. Upon a proper tender of bulky goods, the title passes to the person to whom tendered. It is from this time his property at the election of the tenderer. If the tender is made in payment of a debt, it is paid. If in pursuance of a contract of sale, the seller may resell, or he may hold subject to the call of the purchaser and sell for the price. If he elects to keep possession for the other, it is possession of property which belongs to that other. Retaining goods legally tendered, so as to pass title under such circumstances, amounts to a delivery from the owner to the tenderer. Having elected to keep the property for the owner, a contract to do so properly is at once implied. Coggs v. Bernard, 2 Ld. Raym. 909: 2 Story Cont., § 688, 4th ed.; Story on Bail., § 2 and notes. D. L. A.

Sherburne, N. Y.

Query 29. [12 Cent. L. J. 504.] Is the judgment of a United States District Court a lien upon the real estate of the judgment debtor situated in any part of

such district? Or is it necessary to file a transcript in the county where such real estate is located? X.

Answer 1. The judgment of a United States District Court is a lien upon the real estate of the judgment debtor situated in any part of the district. It is not necessary to file a transcript of the judgment in the county where the land is located. Provost v. Gorrell, 6 Cent. L. J. 261; S. C., 10 Ch. L. N. 228; United States v. Humphreys, 12 Ch. L. N. 88. S.
Osage Mission, Kan., May 28, 1881.

Answer 2. "The liens of the judgments of the several courts of the United States, are charges upon all the lands of the judgment debtors, situate within the territorial limits of the jurisdiction of the court pronouncing judgment, upon which a judgment of like character, entered in one of the courts of the State in which such lands are included, would have been a lien." Freeman on Judgments, 2d ed., sec. 405, citing several authorities. And a transcript need not be filed in the particular county where the land lies; and a State law requiring judgments to be enrolled in the county where the lands to be charged are situate, before becoming liens, can not affect the lien of judgments in the Federal courts. Id. sec. 403; 10 Wheat. 51. C. P. J.
Indianapolis, May 28, 1881.

Answer 3. The lien of judgments of the circuit and district courts of the United States is not created or regulated by any direct legislation of Congress, but is determined by the laws of the State in which the land is situated and judgment rendered (R. S. U. S., secs. 916 and 967), and the practice of the court; yet the preparatory steps, by which the judgment is obtained and the lien established, depend upon the United States Courts. The duration of the lien is fixed by the State law. Its existence and enforcement is wholly the creature of the United States Courts, and must be co-extensive with their jurisdiction. In the absence of a rule of court requiring the docketing in the county where the land is situated, it is not necessary. Notice must be taken of United States judgments docketed or enrolled in the proper United States office. X must consult the statutes of his own State, and Ward v. Chamberlain, 2 Black (U. S.) 430; Clements v. Berry, 11 How. U. S. 398; Lombard v. Bayard, 1 Wall, Jr. 96; Massingill v. Downs, 7 How. U. S. 760; Wayman v. Southmead, 10 Wheat. 1; Bank v. Husteed, 10 Wheat. 51; United States v. Humphreys, 8 Cent. L. J. 469. D. L. A.
Sherburne, N. Y.

RECENT LEGAL LITERATURE.

JARMAN ON WILLS.—A Treatise on Wills, by Thomas Jarman, Esq. In three volumes. Volume III. Fifth American from the Fourth London edition, with Notes and References to American Decisions. By Joseph F. Randolph and William Talcott. Jersey City, N. J. 1881. F. D. Linn & Co., Law Publishers.

With the third volume, which is now at hand, Messrs. Randolph & Talcott have completed their editorial work upon the Jersey City edition of Jarman on Wills. No diminution is apparent in either the extent or the value of the notes, which are now for the first time appended to the treatise by these industrious editors. Numerous are the subjects to which these notes are added, and they cite not only American but English cases. Among other subjects thus illustrated may be mentioned the questions, what words will create an estate tail, what words will suffice to carry a fee, considering in this connection the use of the word "estate," and what language will charge real estate with debts and legacies. The several and different rulings of the American courts in reference to the rule in Shelley's Case are presented in an elaborate note of about ten pages. Without attempting, however, to give any accurate idea of the extent of these notes, we may mention that in the appendix, in a note to the text of the English Statute of Wills, 1 Vict., are stated in substance the corresponding provisions of the statutes of the several American States; and in the index to the work all these statutory provisions are noted under the headings "Maine Statutes," "Maryland Statutes," etc. Of the character of these notes, we may say that they are well compacted, and we see no evidences of intentional padding. It results that the American bar have now at their hands an excellent working edition of Jarman; and we doubt not the editors of this new edition will receive their reward in the shape not only of enconiums, but of large sales of their work. The admirable letter press and binding show that the publishers have vied with the editors in the effort to do their work faithfully.

JONES ON CHATTEL MORTGAGES.—A Treatise on the Law of Mortgages of Personal Property, by Leonard A. Jones, author of Treatises on "Mortgages of Real Property," and "Railroad Securities." Boston, 1881: Houghton, Mifflin & Co.

The subject of this work is one of great and increasing importance. In almost every State there are statutes upon the subject of the filing and recording of such mortgages, and the frequency with which they make their appearance in actual litigation makes a work, dealing with them thoroughly and systematically, a valuable addition to every practitioner's library. The work in question is one of a series upon the general subject of "Property Securities," and has been preceded by a book on "Mortgages of Real Property" and one on "Railroad Securities," and will be followed by one upon "Pledges" and another upon "Liens," if the author is enabled to carry out his present plans. The whole series will present a complete and, it is hoped, a thorough treatment of the cognate subjects "Mortgages, Pledges and Liens." The present work shows the result of careful, systematic and conscientious labor, and will without question be found useful to every practitioner.

NOTES.

——Mr. C. C. Soule, formerly of this city, who, as the head of the firm, Soule, Thomas and Went-

worth, was the founder of this JOURNAL, and who has been for the last few years a member of the firm of Little, Brown and Co., of Boston, has recently withdrawn from that house and become associated with Mr. James M. Bugbee in a law-publishing business in Boston. There is, perhaps, no bookseller who is personally better or more favorably known to the profession throughout the West and South than Mr. Soule. His genial gentlemanly nature has made for him many personal friends among the book-buying members of the profession, while his thorough knowledge of the law book business has won their respect and confidence. We hope the new firm will have every possible success.

——A novel argument: pleas before a county justice of the peace. Pending the defendant's motion that the cause be certified to the circuit court for trial for want of jurisdiction in the magistrate, the title to real estate being in issue. Issue of law tendered by the motion—w hether or not the sworn answer of defendant put title to real estate in issue; motion overruled by the justice who said the trial must go on. Whereupon the defendant's counsel, an intrepid young barrister from the city, delivered the following argument in stentorian voice and threatening attitude: "Very well, your Honor, I have nothing more to say; I consider that I have done my whole duty to my client. I have exhausted argument; I have read the law and explained its application to this case. You know what your duty is. I have shown you that the title to real estate is in issue—you know the title to real estate is in issue. You know you have no jurisdiction. You can go on and try the case if you wish, but you can not compel me to attend, and you proceed at your peril. While you are trying the case, I speed to the city and commence proceedings against you in the circuit court of this county, in the nature of an information *quo warranto*, you assume to usurp the jurisdiction of that court, and before the ink is dry on your judgment, I shall have you in the hands of the sheriff." (By the court.) "I--I, I am not afraid of you, but rather than have any trouble, I guess I will certify the case to the circuit court." Motion sustained.

——Judges are often criticised by many standards, and very divers opinions are formed without much consideration of what are really the most important qualifications for the judicial office. In a country like ours, in which the judgeships in courts of general jurisdiction are numbered by hundreds, and the aspirants for such offices by the thousands and thousands, a just and sober view of what are the important judicial qualifications, is of no small importance to the profession. Success at the bar is not always a test of judicial ability; on the contrary, some of the greatest judges have gone far beyond what would have been expected of them from their career at the bar. Those qualities which give forensic success often involve elements which impede judicial usefulness. Nor is knowledge of the law the paramount consideration. It has been well said that to become deeply versed in law it is almost absolutely necessary to abandon serious prosecution of any other study. But the very complicated interests of modern society, the immense diversity of questions demanding determination, the very broad realm of knowledge into which these questions call the judge, forbid that a great judge should be a great lawyer and nothing more. He must have something of the talent at least, if not of the genius, of a governor, a commander, a ruler among men. It is in the proportion between this quality of instinctive and intuitive authority, and the other of thorough and detailed learning, in which the ability of the judicial officer chiefly rests; and where these qualities are well balanced and adjusted, and are always controlled and constrained by a keen and a strong sense of justice, we have the three elements which always, in whatever judicial system and whatever state of society it may be, have produced eminent and successful judges. Besides these there are other qualifications—of health, urbanity patience, industry—which are in their way essential; but the lack of one of these three qualifications explains a multitude of judicial failures.—*New York Daily Register.*

——A new and curious question of property has been forced upon public attention at Charlotte, North Carolina. Charles Didenouer, sane, intelligent and despairingly poor, mortgaged his body to another man for debt. The transaction was somewhat complicated by the fact that Didenouer has a wife, who had both natural and legal claims in the premises. But Mrs. Didenouer made the transfer and mortgage legal by waiving and signing away all her right, title and claim to Didenouer in the usual form of conveying property, before a magistrate. The deed of mortgage, duly signed and sealed and witnessed, was recognized by the proper officer as a legal transaction. It was not a bond involving a pound of human flesh, but, probably, 150 to 200 pounds, and the quibble of law which alone beat old Shylock in Venice could not be made to apply as against the bondholder in North Carolina. The whole matter is in legal form and on record, and may therefore come up before the courts at some future time over the ownership and disposition of Didenouer's dead body. The old laws of property in human beings are abolished, and the necessity for making any new ones was not apparent. But here is a case presented. Was Didenouer his own personal property or real estate, to dispose of, or was he the personal property or real estate of his wife to relinquish? Whose was he, and whose is he? Could he not have mortgaged himself to a woman, other than his wife, as well as to a man, and if so would the mortgage effect a divorce, and would he be anybody's husband? Be all these things as they may, the anomalous case is on record in the office of register of deeds in Charlotte, N. C.